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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 419 ~~203~~

THE DOLLAR SAVINGS BANK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED SEPTEMBER 16, 1872.

Oct 7 1872

SUPREME COURT OF THE UNITED STATES.

No. 419.

THE DOLLAR SAVINGS BANK, PLAINTIFF IN ERROR,

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INDEX.

	Original.	Print.
Summons	3	1
Complaint	4	2
Defendants' plea	9	3
Verdict	11	4
Opinion	13	5
Judgment	20	7
Writ of error	22	7
Citation	23	8
Bond	25	8
Clerk's certificate	28	9

1 Among the rolls, records, and judicial proceedings of the circuit court of the United States in and for the western district of Pennsylvania, may be found the following words and figures, to wit:

H. B. Swoope. Rob't Robb.

THE UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK. } No. 26. May term, 1872.

Summons debt; certified from U. S. district court. Entered & filed April 26, 1872.

1872. May 31st. Special verdict for plaintiffs in the sum of $5,356.00, & question of law reserved.

1872. June 15th. Opinion of the court delivered and judgment awarded for plaintiff for the sum of $5,356.00 and costs of suit. Same day judgment entered.

June 18th. Præcipe for writ of error filed.

July 29th. Writ allowed & issued.

1872. Aug't . Bond filed. Aug't 5th. Citation issued & served on H. B. Swoope, U. S. attorney.

2 In the U. S. district court, western district of Pennsylvania.

UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK.

Issue summons in debt for taxes due on undistributed fund and contingent fund under act 30 June, 1864, sec. 120, as amended by act 13 July, 1866, not exceeding $22,000. Returnable 1 Monday February.

H. B. SWOOPE,
U. S. Attorney.

To S. C. MCCANDLESS, Esq.,
Clerk U. S. District Court.

3 UNITED STATES,
Western District of Penn'a, sct:

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon the Dollar Savings' Bank, late of your district, if it may be found therein, so that it be and appear before the judge of the district court of the United States in and for the western district of Pennsylvania, at a session of the same court to be holden at Pittsburgh, on the 1st Monday of February next, to answer to the United States in an action of debt. And have you then there this writ.

Witness the Hon. Wilson McCandless, LL. D., judge of the district court of the United States for the western district of Pennsylvania, at Pittsburgh, this 19th day of January, A. D. 1871, and in the 95th year of the Independence of the said United States.

S. C. MCCANDLESS, *Clerk.*

Jan'y 19, 1871. Served personally & by copy upon James Herdman, pres'd't, and Charles A. Colton, cashier of the within-named Dollar Savings' Bank.

JNO. HALL, *Dep'y.*

4 In the United States district court for the western district of Pennsylvania.

UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK. } No. 37. May term, 1871. Summons debt.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

The United States of America, by H. B. Swoope, their attorney, complain of the Dollar Savings' Bank of the city of Pittsburgh, in an action of debt, and they demand of it the sum of fifteen thousand eight hundred and sixty-five dollars and twenty-three cents, which it owes to and unjustly detains from said plaintiff.

For that, whereas, the said defendant heretofore, to wit, on the first day of January, A. D. 1871, at the city of Pittsburgh, in the district aforesaid, and within the jurisdiction of this court, was a bank and savings' institution, existing by virtue of a special act of incorporation, and as such bank and savings' institution, so incorporated, had existed and done and transacted business for a long time, to wit, for more than seven years prior to the bringing of this suit, and was thereby subject to all the requirements and provisions of the one hundred and
5 twentieth section of the act of Congress approved 30th June, 1864, as amended by the act approved 13th July, 1866, under and by virtue of which said act of Congress, and of the other acts in such case made and provided, the said defendant became liable to pay to the United States a tax of five per centum on all undistributed sum or sums made and added during the year to its surplus or contingent fund, which said sums, made and added to its surplus and contingent fund, were as follows, to wit: June first, A. D. 1864, the sum of forty-seven thousand seven hundred and forty-five dollars and forty-two cents, ($47,745.42;) December first, A. D. 1864, the sum of thirty-eight thousand one hundred and sixty-nine dollars and ninety-seven cents, ($38,169.97;) June first, A. D. 1865, the sum of fifteen thousand five hundred and fifty-five dollars and forty-five cents, ($15,555.45;) December first, 1865, the sum of ten thousand one hundred and sixty-nine dollars and sixty-three cents, ($10,169.63;) June 1st, 1866, the sum of twenty-two thousand two hundred and ninety-six dollars and sixty-eight cents, ($22,296.68;) December 1st, 1866, the sum of twelve thousand seven hundred and seven dollars and twenty-six cents, ($12,707.26;)
6 June first, 1867, the sum of ten thousand five hundred and twenty-six dollars and ninety-three cents, ($10,526.93;) December 1st, 1867, the sum of twenty-five thousand and eighty-four dollars and eighty-seven cents, ($25,084.87;) June first, 1868, the sum of six thousand six hundred and eighty-four dollars and forty-three cents, ($6,684.43;) December first, 1868, the sum of twenty-two thousand eight hundred and fifty-eight dollars and sixty-four cents, ($22,858.64;) June first, 1869, the sum of four thousand five hundred and thirty-one dollars and eighty-one cents, ($4,531.81;) December first, 1869, the sum of twenty-two thousand two hundred and ten dollars and twenty-three cents, ($22,210.23;) June first, A. D. 1870, twenty-two thousand two hundred and ten dollars and twenty-three cents, ($22,210.23;) December first, 1870, ten thousand three hundred and thirty-six dollars and thirty-four cents, ($10,336.34;) on each of which said sums so made and added to the contingent fund or surplus fund as aforesaid the said defendant owed, as tax under the act of Congress aforesaid, on and at each

of the days and dates aforesaid, five per centum thereof; and it became and was its duty, by its president, cashier, or treasurer, to make
7 and render a list and return thereof, to the assessor or assistant assessor of internal revenue, which duty it wholly neglected and refused to perform, and which taxes it wholly neglected and refused to pay to the said plaintiff, though often requested so to do, then being due and payable to the said plaintiff as tax, the following sums, to wit:

June	1, 1864.	5 per cent. $47,745.42	$2,387 27
		Interest from 1 June, 1864.	
December	1, 1864.	5 per cent. $38,169.87	$1,908 49
		Interest from 1 Dec'r, 1864.	
June	1, 1865.	5 per cent. $15,555.45	$777 77
		Interest from 1st June, 1865.	
December	1, 1865.	5 per cent. $10,169.68	$508 48
		Interest from 1 Dec'r, 1865.	
June	1, 1866.	5 per cent. on $22,296.68	$1,113 83
		Interest from June 1, 1866.	
December	1, 1866.	5 per cent. on $12,707.26	$635 36
		Interest from Dec'r 1, 1866.	
June	1, 1867.	5 per cent. on $10,526.93	$526 34
		Interest from 1st June, 1867.	
December	1, 1867.	5 per cent. on $25,084.87	$1,254 27
		Int. from 1 Dec'r, 1867.	
June	1, 1868.	5 per cent. on $6,684.43	$334 22
		Int. from 1 June, 1868.	
December	1, 1868.	5 per cent. on $22,858.64	$1,142 93
		Interest from 1 Dec'r, 1868.	
8 June	1, 1869.	5 per cent. on $4,531.81	$226 59
		Interest from 1 June, 1869.	
December	1, 1869.	5 per cent. on $22,210.23	$1,010 57
		Interest from 1 Dec'r, 1869.	
June	1, 1870.	5 per cent. on $22,210.23	$1,010 57
		Interest from 1 June, 1870.	
December	1, 1870.	5 per cent. on	516 81
		Interest from 1 Dec'r, 1870.	

All of which several sums, with the interest thereon, remain due and owing by the said defendant to the said plaintiff.

Yet the said defendant, though often requested, hath not paid the same nor any part thereof, but so to do hath hitherto refused, and still doth refuse, to the damage of said plaintiff of thirty-one thousand seven hundred and thirty dollars and forty-six cents; wherefore they bring suit.

H. B. SWOOPE,
U. S. Attorney.

9 UNITED STATES, *Western District of Penn'a:*

No. 37. May term, 1871.

And the said Dollar Savings' Bank, by Robert Robb, its attorney, comes and defends the wrong and injury, when, &c., and says it does not owe to the said plaintiff the sum above demanded, or any part thereof, in manner and form as the said United States has, in its declaration, above alleged; and of this the said Dollar Savings' Bank puts itself on the country, &c.

ROB'T ROBB,
Def'ts Att'y.

FEB'Y 4, 1871.

10 *Docket entries at No. 37, May term, 1871. (Civil Docket.)*

In the district court of the United States for the western district of Pennsylvania.

Swoope. Robert Robb.

UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK.

Summons in debt for taxes due on undistributed fund and contingent fund, under act 30th June, 1864, sec. 120, as amended by act 13 July, 1866, not exceeding $22,000, issued January 19, 1871, returnable to the 1st Monday of February, 1871. Same day præcipe for summons filed. Same day writ returned—served personally & by copy, on James Herdman, president, and Charles A. Colton, cashier of within-named bank, Feb'y 4th, 1871.—Plea filed. May 15, 1871.—Narr. filed. Nov. 3rd, 1871.—Continued. Feb'y 12, 1872.—Continued—April 26, 1872.—By order of the district judge, this case certified into the circuit court.

11 In the circuit court of the United States for the western district of Pennsylvania.

UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK.
No. 26. May term, 1872. Sum'n'. Debt.

Now, 31st May, 1872, the jury find the following special verdict:

We find that the Dollar Savings'-Bank is a banking-institution created by the laws of the State of Pennsylvania, without stock-holders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors; that the charter authorizes the rention [retention] of a contingent-fund, accumulated from the earnings, to the extent of ten per centum of its deposits, for the security of its depositors; that it has earned and added to the said contingent fund, or undistributed sum, from 13 July, 1866, to 31 December, 1870, one hundred and seven thousand dollars, (the tax of five per cent. on such earnings having been paid prior to 13th July, 1866;) that the earnings were carried to and added to said contingent or undistributed fund semi-annually, on the first days of July and January
12 in each year. And we find, if the court should be of opinion, on this state of facts, that the plaintiff is entitled to recover, a verdict for the United States for the sum of five thousand three hundred and fifty-six dollars, to which is to be added, if the court should be of opinion that plaintiff is entitled to interest on the semi-annual taxes from the time they were due and payable, the further sum of eleven hundred dollars—all of which we find, and submit to the court; but, if the court should be of opinion, on the said facts so found, that the plaintiff is not entitled to recover under the law, then we find for the defendant.

Rendered May 31st, 1872.

13 In the circuit court western district of Pennsylvania.

THE UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK.

MCKENNAN, *Circuit J.*

The special verdict returned by the jury in this case finds, that the defendant "is a banking institution chartered by the laws of Penn'a, without stockholders or capital-stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors;" and it presents the question whether the undistributed earnings of such an institution, which were placed semi-annually to the credit of a fund to be retained under its charter for the security of its depositors, is subject to taxation.

The solution of this question is furnished by the 9th section of the act of Congress of July 13, 1866, (Stat. at Large, vol. 14, page 138,) by which the 120th section of the act of June 30th, 1864, is repealed; and it is enacted, "that there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policy-holders, or depositors or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains
14 of any bank, trust-company, savings-institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds." It needs no argument to prove that the corporation defendant falls within the description of the institutions upon which a tax is imposed by this section. Although it is found to be a banking institution, yet it is more accurately described in the verdict by its functions as a savings institution, as its corporate name indicates. To whichever of these classes it may be assigned it is clearly embraced in the category of taxable subjects. Upon such institutions a twofold tax is imposed; 1, upon dividends declared and payable to stockholders or depositors out of their earnings; and, 2d, upon their earnings in excess of the dividend profits, whether held as an undistributed sum, or added to the surplus or contingent fund. By a proviso to this sub-section, however, it is declared, that "the annual or semi-annual interest allowed or paid to the depositors in savings-banks
15 or savings-institutions," shall not be considered as dividends. This leaves the undistributed sums made or added during the year to the contingent funds of these institutions liable to the tax; and even if the meaning of the preceeding part of the sub-section was at all doubtful, clearly indicates the intention of Congress to subject to taxation all the annual earnings of such institutions, except that portion of them which is allowed to depositors as interest on their deposits.

Having a contingent fund made up of surplus undistributed earnings, the defendant, by the express terms of the act, is liable to the tax of five per cent. imposed by it upon the semi-annual increment of this fund. Nor does it affect the question, that this fund is held as an unauthorized security for depositors; the act makes its liability to taxation to depend upon the fact that it is the accumulation of surplus earnings, and not upon the purpose for which these earnings are with'eld from periodical distribution.

It is not denied that this is the effect of the part of the section above quoted, taken by itself, but it is contended that it must be considered in connection with another part of the section, (14 Stat. at Large, 136,) amending the 110th section of the act of 1866, and that by the proviso
16 thereto the fund in question is exempted from the tax claimed. That proviso is as follows: Provided, that this section shall not apply to associations which are taxed under and by virtue of the act "to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof; and the deposits in associations or companies known as provident institutions, savings-banks, savings-funds, or saving-institutions, having no capital-stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars, made in the name of any one person; and the returns required to be made by such provident institutions and savings-banks after July, 1866, shall be made on the first Monday of January and July, of each year, in such form and manner as may be prescribed by the commissioner of internal revenue." In the body of this sub-sec-
17 tion a monthly tax of one twenty-fourth of one per cent., equal to one-half per cent. per annum, is imposed upon the average amount of deposits subject to draft "with any person, bank, association, company, or corporation engaged in the business of banking," and it is very plain that to this tax alone do the terms of the proviso apply. While by the general terms of the enactment, all persons engaged in banking are subjected to this tax upon deposits, the proviso exempts from it so much of the deposits with a special class of institutions as may be invested in Government securities, or as do not exceed $500, in the name of any one person; no doubt, on account of the beneficial character of such investment and as a concession to depositors of limited means.

Now the tax in controversy is imposed upon earnings, and, in the case of savings institutions, only upon so much of them as may remain after deducting allowances to depositors as interest upon their deposits.

Recognizing again the meritorious objects and operation of such institutions, the act establishes a provident adjustment of the tax by which the stipulated gains of the depositors are not abridged. But be-
18 cause the same considerate liberality induced a partial exemption of deposits from taxation, it does not follow that the proviso which secures it, is to be extended beyond the subject to which it is appropriate, or the context which it expressly qualifies. By no latitude of implication can this be done, when both the subject and the rate of taxation to which it is sought to apply the proviso, are different from those to which it expresely relates. In the one case the tax is imposed upon surplus earnings, and at the rate of five per cent.; in the other upon deposits, and at the rate of one-half of one per cent. Now the proviso exempts from the latter tax deposits with institutions named, which are invested in certain securities, and are of limited amount in names of single individuals. It refers exclusively to this tax, and restricts its imposition, as stated, and it has no necessary relation to any other tax imposed by the act. It cannot, therefore, by implication, be made more comprehensive than its terms import, or be extended beyond the scope within which both its reason and its subject confine it.

But it is urged that as "provident institutions," to which it is
19 alleged the corporation defendant belongs, are named in the pro-

viso, and not in the sub-section imposing the tax upon earnings, they are excluded from the imposition of this tax. Whether a distinct class of institutions is thus described or whether they are generically the same as the others named in the proviso is altogether immaterial. If they are not banks or savings institutions their earnings are not taxable. But, as before mentioned, the defendant here is properly found to be a savings-institution, and as such expressly designated by the act, its surplus earnings are subject to taxation.

The United States is therefore entitled to judgment for the amount of tax in arrear. Upon this sum interest is claimed, but I do not think it is allowable, although it does not appear in the verdict. It has been orally agreed by the counsel that the defendant was not reprehensibly in default, but that its refusal to pay the tax claimed was induced by the inconsistent action and the conflicting opinions of the Internal Revenue Department as to its liability and its reasonable desire
20 therefore to have this judicially determined. Under such circumstances, interest ought not to be exacted. But, besides this, a specific penalty is imposed for default in the payment of the tax, which is therefore the exclusive measure of accountability beyond the amount of the tax itself. For this a separate action is pending, and the liability of the defendant must be limited to the amount of tax in arrear.

It is therefore ordered that judgment be entered on the verdict for the plaintiff for the sum of $5,356.00.

1872, June 15th. Judgment is hereby entered in favor of plaintiff and against defendant, for the sum of five thousand three hundred & fifty-six ($5,356.00) dollars & costs of suit.

H. D. GAMBLE, *Clerk.*

21 In the circuit court of the United States for the western district of Pennsylvania.

THE UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK. } No. 26. May term, 1872.

Issue writ of error in above case, ret'ble to 1st Monday of Dec. next, 1872.

ROB'T ROBB,
Att'y for Def't.

JUNE 18*th*, 1872.

To H. D. GAMBLE, Esq.,
Clerk U. S. C'r. C't W. D. of P'a.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States, plaintiff, and The Dollar Savings' Bank, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 1st Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 29th day of July, A. D. 1872.

[SEAL.] H. D. GAMBLE, *Clerk.*

Allowed by—

W. McKENNAN,
Circuit Judge.

(Indorsed :) No. 26. May term, 1872. The United States vs. The Dollar Savings' Bank. Writ of error.

23 UNITED STATES OF AMERICA,
Western District of Pennsylvania, sct. :

To H. B. Swoope, attorney of the United States for the western district of Pennsylvania, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 1st Monday of December next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein The Dollar Savings' Bank is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this fifth day of August, A. D. 1872.

W. McKENNAN,
Judge of U. S. Circuit Court.

24 (Indorsed :) No. 26. May term, 1872. The Dollar Savings' Bank, pl'ff in error, vs. The United States, def't in error. Citation.

AUG'T 7, 1872.—Service accepted.

H. B. SWOOPE, *U. S. Att'y.*

Service accepted as above.

A. MURDOCK, *U. S. M.*

Marshal, M., $2.50.

25 THE DOLLAR SAVINGS' BANK, PLAINTIFF in error,
vs.
THE UNITED STATES.

Know all men by these presents, that we, The Dollar Savings' Bank, a corporation, &c., James Herdman and James B. D. Meeds, of the

county of Allegheny, and State of Pensylvania, are held and firmly bound unto the United States, in the sum of three hundred dollars, to be paid to the said United States, its certain attorney, successors, or assigns, to which payment, well and truly to be made, The Dollar Savings' Bank does bind itself, and its successors and assigns, and the said James Herdman and James B. D. Meeds, bind themselves and their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Witness the hand of the president of The Dollar Savings' Bank, and seal of the corporation, attested by the sec-
26 retary, and also the hands and seals of James Herdman and James B. D. Meeds, this fifth day of August, A. D. 1872.

Whereas the above-named Dollar Savings' Bank hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a suit in the circuit court of the United States for the third circuit and western district of Pennsylvania, wherein the said United States was plaintiff, and the said Dollar Savings' Bank was defendant, the said suit being No. 26, May term, 1872:

Now, the condition of this obligation is such, that if the above-bounden Dollar Savings' Bank shall prosecute its said writ of error to effect, and answer all damages and costs in said suit, and just damages for delay, and costs and interest on the appeal, if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

Sealed and delivered in presence of—

JAMES HERDMAN, *Pres't.* [SEAL.]
JAMES HERDMAN. [SEAL.]
JA'S B. D. MEEDS. [SEAL.]

Attest: JA's B. D. MEEDS, Esq., as to Ja's Herdman, pres't.
B. I. MCCLURE, as to James Herdman*d* and Ja's B. D. Meeds.

27 (Indorsed: No. 26. May term, 1872. United States vs. The Dollar Savings' Bank. Bond for costs.

And now, August 5th, 1872, the within bond is approved, per curiam.
R. Robb.

28 In the circuit court of the United States for the western district of Pennsylvania.

THE UNITED STATES
vs.
THE DOLLAR SAVINGS' BANK. } No. 26. May term, 1872.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at Pittsburgh, this 5th day of August, A. D. 1872.

[SEAL.] H. D. GAMBLE, *Clerk.*

[5-c't int. rev. stamp, canceled.]

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William McKennan, judge of the United States circuit court for said district, do hereby certify that H. D. Gamble above-named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

W. McKENNAN,
U. S. Circuit Judge.

[5-c't int. rev. stamp, canceled.]

PITTSBURGH, *August 5th*, 1872.

(Indorsement on cover:) No. 419. The Dollar Savings' Bank, plaintiff in error, vs. The United States. W. Pennsylvania C. C. U. S. Filed 16th September, 1872.

Supreme Court of the United States.

October Term, 1873.

No. 203.

THE DOLLAR SAVINGS BANK,

PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ARGUMENT OF MR. B. R. CURTIS,

FOR THE PLAINTIFF IN ERROR.

ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1873.

NO. 203.

THE DOLLAR SAVINGS BANK, Plaintiff in Error,

vs.

THE UNITED STATES.

STATEMENT OF THE CASE.

This case comes here by writ of error to the Circuit Court of the United States for the Western District of Pennsylvania.

It is an action of debt, brought by the United States in that Court against the defendant bank, to recover certain internal revenue taxes alleged in the declaration to be due from the defendant bank. These taxes are supposed to have been authorized by an amendment contained in the Internal Revenue law of 1866, found in the ninth section of the Act of Congress of July 13, 1866 (Statutes at Large, vol. 14, page 138), by which part of the Act of June 30, 1864, is repealed; and in place thereof it is enacted:

"That section one hundred and twenty be amended by striking out all after the enacting clause, and inserting in lieu thereof the following: That there shall be levied and collected *a tax of five per centum on all dividends in scrip or money thereafter declared due*, wherever and whenever the same shall be payable, to stockholders, policy-holders, or depositors, or parties whatsoever, including non-residents, whether citizens or aliens, *as part of the earnings, income, or gains* of any bank,

undistributed

trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undisturbed sums, or sums made, or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said tax of five per centum. And a list or return shall be made and rendered to the assessor, or assistant assessor, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal:

"*Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable; *nor shall* the portion of premiums returned by mutual life insurance companies to their policy-holders, nor *the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions*, be considered as dividends."

The theory of the case on the part of the government is, that this act requires a tax of five per cent to be levied and collected, amongst other things, on sums added during the year by the defendant bank to its surplus or contingent fund, without regard to the character of the Bank or the nature and purpose of that fund. The section above quoted contains a requirement that each bank shall make a certain return, under oath or affirmation of one of its officers, "in form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of the taxes aforesaid." And the last clause of the amended 110th section (14 Sts. 137) is, "and the returns required to be made by such provident institutions and savings banks after July, 1866, shall be made on the first Monday of January and July of each year, in such form and manner as may be prescribed by the commissioner of internal revenue."

It appears by reference to the "Internal Revenue Record," vol. 5, page 60, that, after the passage of this act, Mr. Rollins, the then commissioner of internal revenue, made in February, 1867, a construction of the act in question, so far as it affected banks of the character of this defendant bank, that they were not required to pay a tax upon the amounts added to their retained funds, instead of being divided among their depositors, and that of course no return relating to any such subjects was required from such a bank.

This action of Commissioner Rollins was repeated by his successor, Commissioner Delano, in 1870, as appears from vol. 11, page 73, of the "Internal Revenue Record"; and it was again affirmed and repeated by Commissioner Pleasanton, in 1871, as appears from vol. 13, page 73, of the "Internal Revenue Record."

Of course this defendant bank made no return during either of the years mentioned in the declaration, not being required to do so by the commissioner of internal revenue; and, so far as appears from the special verdict which will hereafter be adverted to, no such tax was assessed by the proper assessor, or ordered to be collected by the proper collector during either of these years. But when, in the year 1872, the successor of

Gen. Pleasanton adopted a different construction of the act, this action of debt was brought to recover the taxes which the declaration alleges should have been paid between June 1, 1864, and Dec. 1, 1870, inclusive; and these taxes, thus alleged to be due, form the subject-matter of this suit. The jury found a special verdict, which is in words following:

"We find that the Dollar Savings Bank is a banking institution created by the laws of the State of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits, to be loaned or invested for the sole benefit of its depositors; that the charter authorizes the *retention* of a contingent fund, accumulated from the earnings, to the extent of ten per centum of its deposits *for the security of its depositors;* that it has earned and added to the said contingent fund, or *undistributed sum*, from 13th July, 1866, to 31st December, 1870, one hundred and seven thousand dollars (the tax of five per cent on such earnings having been paid prior to 13th July, 1866); that the earnings were carried to and added to said contingent or *undistributed fund semi-annually*, on the first days of July and January in each year. And we find, if the court should be of opinion, on this state of facts, that the plaintiff is entitled to recover, a verdict for the United States for the sum of five thousand three hundred and fifty-six dollars, to which is to be added, if the court should be of opinion that plaintiff is entitled to interest on the semi-annual taxes, from the time they were due and payable, the further sum of eleven hundred dollars, all of which we find and submit to the court; but, if the court should be of opinion, on the said facts so found, that the plaintiff is not entitled to recover under the law, then we find for the defendant."

The court rendered a judgment upon this special verdict in favor of the United States for the sum of five thousand three hundred and fifty-six dollars, with costs of suit.

First Assignment of Errors.

The Act of Congress in question does not authorize the levy and collection of the tax in question upon the defendant bank; and the ruling of the Court to the contrary was erroneous.

A careful consideration of the act above quoted, it is submitted, will show that the decisions of the Commissioners above named were correct. They seem to have been founded upon this view of the law: that Congress intended to tax the net earnings of certain banking and other institutions named, whether those net earnings should be distributed to the stockholders in the form of dividends, or retained and added to the capital; and that in those cases in which Congress did not intend to tax the distributed earnings, they did not intend to tax the undistributed earnings; and as it is expressly declared in the law, that sums paid to depositors in savings bank are not to be deemed dividends within the meaning of that word in the law, neither should the sums which the bank has lawfully omitted to pay to its depositors, and has held undistributed not as an addition to the capital stock (such banks having no capital stock), but only for the security of its depositors in the future, be deemed taxable as such surplus.

It is important to note in this connection, that, while this power of the Commissioners to prescribe what returns should be made by savings banks was in full force, and while the construction placed by the Commissioners on the law was known by public promulgation, Congress passed the Act of July 14, 1870 (16 Sts. 256), and in the 15th section used substantially the same language concerning the subject now in question as was contained in the Act of 1866; and the case stands thus: Congress required the Commissioner to prescribe what returns savings banks should make. This necessarily required him to put a construction on the law. He did so, and held they were not required to return the sums held undistributed solely for the security of these depositors. After this practical construction had been made and acted on for nearly four years, Congress re-enacted the tax, reduced in amount, in the same words which had received this practical construction.

It is a settled rule, that the re-enactment of a statute which had received a *judicial* construction in effect adopts that construction.

Kirkpatrick *vs.* Gibson's Executors, 2 Brock. 388.
Adams *vs.* Field, 21 Vt. 256.
Yates' case, 4 Johns. 359.

And why not apply the same principle to a contemporaneous practical construction put upon the act by an officer expressly required to construe it?

Edwards' Lessee *vs.* Darby, 12 Whea. 206.

SECOND ASSIGNMENT OF ERRORS.

The Court erred in holding that an action of debt was maintainable in that Court for the recovery of the taxes in question.

This was an action at the common law.

The United States has no common law (Wheaton *vs.* Peters, 8 Peters, 658); but the thirty-fourth section of the Judiciary Act provides that the laws of the several States shall be the rules of decision in the trial of actions at the common law.

The first question, therefore is, whether, by the law of Pennsylvania, as it existed in 1789, an action of debt would lie to recover a tax authorized to be levied and collected by a statute, which statute afforded a remedy for its assessment and collection.

I understand this question to be settled, not only in Pennsylvania, but in many States. The principle is, that, where a statute creates a right, and provides a particular remedy by which that right may be vindicated, no other remedy than that afforded by the statute can be used.

Mayer *vs.* Kirby, 14 S. and R. 165; Turnpike Co. *vs.* Brown, 2 Penn. R. 463; Turnpike Co. *vs.* Martin, 12 Penn. State Reports, 37.

The same principle will be found to have been laid down and applied by the Supreme Court of Massachusetts in Boston *vs.* Shaw, 1 Metcalf, 138,'9, and the cases there cited; and this prin-

ciple has also been affirmed in cases in other States, to which it is not deemed necessary to make reference.

But if, upon any state of facts, an action of debt would lie to recover taxes required to be levied and collected by an act which afforded a specific remedy for their assessment and collection, no such action would lie under the statute in question; because it expressly provides, that "in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal."

Those other provisions here referred to are found in 14 Statutes, 103, '4. They require the assessor to make lists; they point out what the lists are to contain; they authorize him at any time *within fifteen months* from the time of the passage of the act, or from the time of the delivery of the list to the collector, to make special additional lists; and these general or special lists are to be delivered by him to the collector, to stand as his warrant for the levy of the tax upon the property of the delinquent tax-payer, pursuant to the directions of the statute.

It will be further submitted, that, even if an action of debt could be sustained, according to the common law of Pennsylvania, or any common law, to recover taxes *duly assessed, duly notified and demanded*, it does not appear by the special verdict, nor is there any reason from the known facts even to conjecture, that any one of these taxes ever was duly assessed. For aught that appears, the commissioners of internal revenue, during the period which elapsed between June 1, 1864, and Dec. 1, 1870, gave such instructions to the assessors that none of these taxes were assessed; and when, at the end of that time, a new commissioner promulgated new views as to the construction of the law, this action of debt was brought. Now, if there had been any attempt regularly to assess these taxes, by reason of an assumed mistake in the construction of the law under which assessments had been omitted, the assessor could

not have gone back of the period of fifteen months before he delivered his last list to the collector. Yet, without any attempt to make such a corrected assessment, so far as appears, or, indeed, ever to assess regularly the taxes demanded in this suit, the court below has rendered a judgment for their full amount.

I am aware that it was held by Mr. Justice Story, in the case of The United States *vs.* Lyman, 1 Mason, 482, that an action of debt might be maintained in the Circuit Court of Massachusetts to recover *customs duties* which became payable by reason of the importation of merchandise into the United States; and that this doctrine was repeated by him in the case of Meredith *vs.* The United States, 13 Peters, 486.

In these cases, however, it did appear, affirmatively, that the customs duties for the recovery of which the action was brought had been duly assessed before action brought; and possibly there may be some distinction between customs duties, the right to which accrues to the United States by reason of the voluntary introduction into its territory of merchandise by its owner, and a tax of the character of that in question in this case. But neither the counsel in the cases just referred to, nor the Court, adverted to the principle that the United States has no common law, but must receive it from the laws of the several States in which the trials are had. Overlooking, as I conceive, this rule, the learned judge resorts to some early decisions made in the Court of Exchequer in England, concerning the recovery by the Crown of duties upon merchandise, which are entirely inconsistent with the common law of Massachusetts, as shown in the decisions of the highest court of the State, to which reference has been above made.

B. R. CURTIS,
Of Counsel with the Plaintiff.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

DOLLAR SAVINGS BANK
vs.
THE UNITED STATES. } No. 203.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

STATEMENT.

Debt by the United States against a savings institution to recover taxes alleged to be due under the act of 1866, ch. 184, sec. 9, (14 Stats., 138.)

The jury returned the following special verdict:

"We find that the Dollar Savings Bank is a banking institution, created by the laws of the State of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors; that the charter authorizes the retention of a contingent fund, accumulated from the earnings, to the extent of ten per centum of its deposits, for the security of its depositors; that it has earned and added to the said contingent fund, or undistributed fund, from 13th July, 1866, to 31st December, 1870, one hundred and seven thousand dollars, (the tax of five per cent. on such earnings having been paid prior to the 13th July, 1866;)

that the earnings were carried to and added to said contingent or undistributed fund semi-annually, on the first days of July and January in each year. And we find, if the court should be of opinion on this state of facts that the plaintiff is entitled to recover, a verdict for the United States for the sum of five thousand three hundred and fifty-six dollars, to which is to be added, if the court should be of opinion that plaintiff is entitled to interest on the semi-annual taxes from the time they were due and payable, the further sum of eleven hundred dollars—all of which we find and submit to the court; but if the court should be of opinion, on the said facts so found, the plaintiff is not entitled to recover under the law, then we find for the defendant."

Upon this special verdict, the circuit court rendered judgment for the United States for the sum of $5,356, from which judgment the defendant prosecutes this writ of error.

ARGUMENT.

The statute under which this suit was brought is the section amending section 120 of the act of 1864, ch. 173, (12 Stats., 283, 284,) by striking out all after the enacting clause, and inserting in lieu thereof the following:

"That there shall be levied and collected a duty of five *per centum* on all dividends in scrip or money, thereafter declared due, and whenever the same shall be payable to stockholders, policy holders, or depositors, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds. * * * *Provided*, That * * * the annual or semi-

annual interest allowed or paid to depositors of savings banks or savings institutions" shall not "be considered as dividends."

Construing this section by itself, there can be no doubt that the savings bank, which is plaintiff in error in this suit, falls within it. The special verdict finds it to be "a banking institution chartered by the laws of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors; that the charter authorized the retention of a contingent fund, accumulated from the earnings, to the extent of ten per centum of its deposits, for the security of its depositors."

This contingent fund, thus accumulated, falls within the body of the statute, and this construction is placed beyond a doubt by the exception in the proviso of the annual or semi-annual interest allowed or paid to depositors. This construction of this part of the section is not affected by the preceding part, (14 Stats. at Large, 136,) amending the 110th section of the act of 1864, which was before this court for construction in the case of Oulton *vs.* German Savings and Loan Society, at last term. There it is provided that "the deposits in associations or companies known as provident institutions, savings banks, savings funds, or savings institutions, having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of

the United States, and on all deposits less than five hundred dollars made in the name of any one person." (14 Stats., 137.)

This quotation is part of the proviso or exception to the section substituted for section 110 of the act of 1864. By it a tax of one per cent. a month was levied upon the deposits subject to payment by check or draft in certain banks, and the court held, in the case above cited, that the body of the section applied to and included savings banks. The proviso must be limited to the subject-matter of the section to which it is an exception. This is the natural and proper construction unless there be something in the proviso demanding a broader construction, and in this case it reconciles the new section 110 with section 120. Section 110 provides for a tax upon deposits in savings banks, and favors savings institutions having no capital stock and doing business solely for the benefit of the depositors. Section 120, as amended, imposes a tax upon the undistributed sums made or added during the year to the contingent fund of the savings banks. This reconciles both sections.

The opinion of the circuit court on this case is printed in the Record, pp. 5–7.

C. H. HILL,
Assistant Attorney General

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CONDITION OF ORIGINAL

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THE UNITED STATES. } No. 203.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The second assignment of errors, it is submitted, cannot be maintained.

The claim for taxes was a debt, for which an action of debt will lie.

3 Bl. Com., 158.

Stockwell *vs.* United States, 13 Wallace, 531, 541–543.

United States *vs.* Lyman, 1 Mason, 482.

Whether an action of debt will lie for a tax imposed by Congress is a question of common-law procedure, and not of local law, in which this court is bound by the decision of the Pennsylvania courts.

Chicago *vs.* Robbins, 2 Black, 418.

Neves *vs.* Scott, 13 How., 268.

Homer *vs.* Brown, 16 How., 354.

It is not necessary that the notification, assessment, and demand of the tax should appear in the special verdict. They do not create the obligation to pay the

tax. That is created by the statute, and if the facts in the special verdict show that there had become due a tax from the bank to the United States, that is sufficient.

C. H. HILL,
Assistant Attorney General.